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746-705—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 492

JOSEPH CELSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a–38a) is not yet reported. The opinion of the district court denying a motion to suppress (Pet. App. 3a–18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1964 (Pet. App. 39a–40a). The petition for a writ of certiorari was filed on September 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the arrest without a warrant of petitioner and others in a garage was valid, so that stolen

goods seized as incidental to the arrest were admissible in evidence.

2. Whether the trial court abused its discretion in refusing to compel the government to disclose the identity and whereabouts of its confidential informant whose initial information led to the arrest and seizure.

3. Whether the court's charge was proper.

STATEMENT

Petitioner and several co-defendants were convicted in the United States District Court for the District of New Jersey of possessing goods valued in excess of $100, constituting part of an interstate shipment, with knowledge that they were stolen, in violation of 18 U.S.C. 659. He was sentenced to imprisonment for three years (R. 325a–326a). On appeal (328a–335a) the conviction was affirmed (Pet. App. 39a–40a).

1. Evidence at a hearing on the defendants' pretrial motion to suppress evidence seized on January 11, 1962 (R. 18a–19a) may be summarized as follows:

Mr. Levine, a witness for defendant Zax, testified that he owned a garage at 15 West 22nd Street, Bayonne, New Jersey, which had originally been a fire house owned by the city (R. 21a). The garage had a center electrical door which could be operated only from the inside (R. 2b–3b). The building, which had been vacant since the early part of 1961, was unheated, and the windows were constantly broken by neighborhood children (R. 1b, 3b). Drunks, who could enter the back of the garage without a key, sometimes slept there (R. 4b–6b). The garage was

diagonally across the street from the Hoo-Ha Bar, located at 8–10 West 22nd Street, which was managed by Zax (R. 24a, 25a, 45a).

In the latter part of December 1961, Levine leased the garage to Zax on a month to month basis for $100 per month, to begin on January 1, 1962 (R. 21a–22a, 27a). At that time only one window was boarded up (R. 4b), but by January 11, 1962, all the windows were covered from the inside with plywood (R. 2b, 136b). Zax testified that on January 4 or 5, 1962, he subleased the garage to Joseph Pope, described as a local businessman, for $50 (R. 29a–30a).

Evidence on behalf of the government showed that on the evening of December 21, 1961 a truck, en route from Rochester to New York City with a load of about 3500 suits, was hijacked near Parksville, New York (R. 42a–43a). Some time prior to January 10, 1962, an informant telephoned F.B.I. agent Parker that an unlimited quantity of Bond clothes was being disposed of in the Bayonne area in the vicinity of the Hoo-Ha Bar. He gave specific manufacturers' label numbers for the garments (R. 52a, 94a, 95a, 26b). The agent recognized the telephone voice of the informant, who in the past had given completely reliable information which on several occasions had led to the solution of crimes (R. 94a–95a, 103a, 104a, 26b, 27b).[1] The identification numbers were sent to the Buffalo F.B.I. office with a request that they be

[1] Defense counsel asked for the name of the informant, but government counsel's objection that this was a confidential source which could not be divulged was sustained (R. 53a–60a).

checked (R. 51a, 11b). These numbers were identified by the manufacturers as being from the hijacked shipment (R. 51a, 10b–11b).

On January 10, 1962 at about 7:00 p.m., on the strength of the informant's corroborated information and the reputation of the Hoo-Ha Bar,[1] F.B.I. agents began a surveillance of the area (R. 44a-45a, 52a, 76a, 85a). When an automobile was parked on the south side of West 22nd Street and the driver entered the Hoo-Ha, an agent walked past the vehicle and observed that it was empty (R. 76a–77a). At about 8:20 p.m., the automobile was driven into the garage at 15 West 22nd Street (R. 77a–78a). Shortly thereafter it was driven out of the garage and was parked abreast of an F.B.I. car on West 22nd Street (R. 78a, 13b). After the driver, identified as defendant Juliano, entered the Hoo-Ha (R. 79a, 13b–14b), agent Straub walked past and, with the aid of the street lights, saw several suits with white tags lying on the back seat of the car (86a, 23b–24b). A few minutes later a man emerged from the Hoo-Ha and drove the car away (R. 79a).

On January 11, 1962, between 3:00 and 5:00 p.m., F.B.I. agents obtained a search warrant for the garage (R. 83a, 88a–89a, 299a–303a). At 7:00 p.m., surveillance was resumed by about 10 or 12 agents (R. 46a, 61a, 80a). At about 9:30 p.m., a man parked a Ford station wagon on the north side of West 22nd Street

[1] Zax, the operator of the bar, was a gambler with a criminal record; patron Juliano had concealed weapons charges on his record; and patron Konigsberg had numerous arrests and had reportedly been engaged in "shylocking" (R. 18b–23b).

and entered the Hoo-Ha. A few minutes later three men came out and walked across the street to the garage (R. 80a). One of these men, Juliano, moved a parked Pontiac so that the station wagon could be backed into the garage, after which the garage door closed (R. 80–81a). No lights were visible from the outside of the garage, but the agents could hear the rustling of papers and laughter (R. 87a). After the agents waited for about an hour (R. 47a, 81a, 87a) the garage door began to be raised by the occupants. Four agents were standing on the sidewalk in front of the garage (R. 25b, 15b, 11b–12b, 62a–63a). Although the lights in the garage had been turned off (49a, 16b), the street lights and flashlights held by several agents enabled them to see into the garage (R. 49a, 64a, 7b–8b, 12b, 17b). The agents saw piles of suits, some as near as five feet away, on the floor of the garage (R. 49a, 88a, 9b, 15–16b). Suits piled in the Ford station wagon were also visible (R. 7b, 14b). Petitioner was in the driver's seat of the station wagon, which was facing the garage door (R. 48a). The agents identified themselves as F.B.I. men and announced that the occupants of the garage were under arrest (R. 84a–85a, 88a, 16b, 25b). The agents arrested petitioner, Juliano, Konigsberg and Nalewajka (R. 50a).[1] The search warrant was not executed, since the four defendants in the garage were arrested pursuant to 18 U.S.C. 3052 upon the reason-

[1] The agents found a fifth man, Laguardia, nearby but he was released when none of the agents said he had come out of the building (37b–39b). Agents Parker and Roetzel both said that Laguardia was not the informant (R. 40b, 89b).

able belief that a felony was being committed. On January 12, 1962 defendant Zax was arrested under an arrest warrant (R. 50a–51a).

At the conclusion of the hearing on the motion to suppress, the court denied the motion, on the alternative grounds (a) that the defendants lacked standing to object to the search and seizure and (b) that the search and seizure were proper as incident to a valid arrest (R. 305a–320a). At the trial, the court overruled the defense objection that testimony concerning the contents of the garage was inadmissible on the ground that the contents were the fruit of an illegal search and seizure (R. 140b).

2. At the trial petitioner testified on his own behalf that he met a stranger in a restaurant who wanted to rent his station wagon for $25. Under instructions from this stranger, petitioner backed his station wagon into the garage (R. 266a–267a). In the garage there were people who were unknown to petitioner (R. 119b–120b). As petitioner was about to leave, one man, who was loading suits into petitioner's station wagon, told him to wait outside for the "boss" [the stranger who rented petitioner's station wagon] (R. 120b). Petitioner never saw the "boss" again or looked for him (R. 121b). Petitioner admitted three previous convictions for burglary, theft, and conspiracy to violate provisions of the Internal Revenue Code relating to liquor (121b).

ARGUMENT

1. While both courts below undertook to discuss to question of standing, we do not rely upon any lack of standing as justification for the admissibility of

the evidence.[4] We rely, rather, upon the alternative ground that the seizure was incidental to petitioner's lawful arrest without a warrant under 18 U.S.C. 3052[5] by F.B.I. agents who had probable cause to believe that he was committing a felony. See *Draper* v. *United States*, 358 U.S. 307, *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145. The agents had information from a reliable informant that an unlimited number of suits were being disposed of in the vicinity of the Hoo-Ha Bar. The reliability of the informant was corroborated when the numbers he gave proved to have come from the hijacked shipment. The agents knew that on the previous night suits with identification tags similar to those in the stolen shipment had been removed from the garage. They were also aware that men coming from the disreputable Hoo-Ha Bar had entered the garage. When the door was opened from within, and suits were seen on the floor of the garage and in petitioner's station wagon, the agents had ample cause for the arrests.[6]

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[4] Petitioner would seem at least to have standing to attack the seizure of the suits taken from his station wagon.

[5] 18 U.S.C. 3052 provides in pertinent part: "* * * agents of the Federal Bureau of Investigation * * * may * * * make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

[6] *United States* v. *Coplon*, 185 F. 2d 629 (C.A. 2), certiorari denied, 342 U.S. 920 (Pet. 18) is not in point. It was decided prior to the amendment of 18 U.S.C. 3052 on January 10, 1951 allowing F.B.I. personnel to make arrests without a warrant on probable cause.

2. The contention that the court erred in not requiring the government to disclose the identity of the informant whose information started the investigation, is answered by this Court's decision in *Rugendorf* v. *United States,* 376 U.S. 528. Petitioner made no showing that the name of the informant was necessary to his defense. Indeed, agent Roetzel testified at the hearing on the motion to suppress that the informant gave no indication that he was related in any way to the hijacking, transportation, sale, or distribution of the stolen clothing (R. 8b). There was also testimony by agents Parker and Roetzel that Laguardia, the fifth man discovered near the garage and later released, was not the informant (R. 40b, 89b). Thus there was no showing that the identity of the informant had any bearing on the offense for which petitioner was convicted.[1]

3. (a) In its original charge the court stated (R. 261a): "I do not recall any evidence in this case upon which that defense [entrapment] might rest, but it is, as I have said before, your recollection of the testimony and not mine that governs. Therefore I will charge the law relating to this defense." The court then gave instructions on the law of entrapment (R. 261a–262a). At the conclusion of the charge petitioner's counsel, Mr. Querques, objected to the court's statement that it did not recall any evidence upon

[1] Petitioner suggests that the informant may have been the stranger who wanted to rent his station wagon and brought him to the garage (Pet. 10). If there were such a man it seems reasonable that petitioner would have tried to contact this stranger; but petitioner testified that after his arrest he never saw this man again and made no attempt to look for him (R. 121b).

which the defense of entrapment could rest, and to the court's instruction that entrapment pertained only to action by government officers, and not to others acting on behalf of such officers (R. 279a–281a). The court then corrected its charge, giving supplementary instructions that anyone acting on behalf of the government, as well as government officers, could be guilty of entrapment. The court again charged that, despite its statement that it did not recall any testimony making the defense of entrapment applicable, it was the jury's recollection, not the court's, which governed (R. 285a–287a). Thereafter petitioner's counsel stated he had no further objections to the charge (R. 290a). It is clear therefore, that when the charge is read in its entirety, as it must be (*Boyd* v. *United States*, 271 U.S. 104, 107; and see R. 240a), the law on entrapment was properly presented to the jury, whose duty it was to decide the issue. *Masciale* v. *United States*, 356 U.S. 386.[8]

(b) The other objection to the instructions which petitioner now raises was not made at the trial and is without merit. There is no conflict between the initial instructions as to guilty knowledge and the later ones on actual and constructive possession. The requirement that the accused should have guilty knowledge that the goods had been stolen was stated on numerous occasions in the original charge (R. 244a, 246a, 247a, 250a, 251a, 259a). Later the jurors re-

[8] *United States* v. *Nani*, 218 F. 2d 730 (C.A. 2) (Pet. 13–15) is inapposite. In *Nani*, unlike the instant case, the instructions contained no intelligible statement as to what constituted the defense of entrapment, and the jury was improperly instructed that only a government employee could entrap the accused.

quested only a definition of the term "possession" (R. 291a, 294a), but did not ask for definitions of elements related to possession, such as guilty knowledge or interstate commerce. In then re-charging the jury on the requested narrow issue by defining different kinds of possession (R. 294a–296a), it was not necessary that the court restate the requirement of guilty knowledge since this had already been exhaustively covered in the original charge.

There is nothing in the supplemental charge defining constructive possession (R. 295a) which conflicts with the original charge on this subject (R. 256a). Nowhere in the supplemental charge is there any express or implied instruction that constructive possession, without more, would permit the jury to draw an inference of guilty knowledge. In order to find petitioner guilty the jury was required to make an independent finding of his possession with guilty knowledge that the goods had been stolen, as required by the original charge (R. 244a, 250a, 259a).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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